Niyah v New York City Police Dept.
2017 NY Slip Op 31748(U)
July 7, 2017
Supreme Court, Bronx County
Docket Number: 22702/2014
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 22702/2014
Motion Calendar No. 16
Motion Date: 4/17/2017

CHARLOTTE NIYAH, AS GUARDIAN FOR
ISABEL LOPEZ, A MINOR, AND
CHARLOTTE NIYAH

Plaintiffs,

-against-

NEW YORK CITY POLICE DEPARTMENT AND
THE CITY OF NEW YORK

Defendants.

DECISION/ ORDER
Present:
Hon. Wilma Guzman
Justice Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to dismiss the plaintiff's complaint:

Papers	**Numbered**
Notice of Motion, Affirmation in Support, and Exhibits thereto	**1**
Affirmation in Opposition	**2**
Reply in Affirmation	**3**

Motions decided as follows: Upon deliberation of the application duly made by defendants, NEW YORK CITY POLICE DEPARTMENT (hereafter "NYPD") AND THE CITY OF NEW YORK (hereinafter "CITY"), by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order: (1) Pursuant to CPLR §3211(a)(7-8), dismissing all claims against NYPD; (2) pursuant to CPLR §3212, dismissing the plaintiff's claim for intentional infliction of emotional distress; (3) pursuant to CPLR §3212, dismissing plaintiff's general negligence claim; and (4) pursuant to CPLR §3103, for a protective order, modifying and/or limiting the directives contained in the November 12, 2015 Preliminary Conference Order, is heretofore granted in part and denied in part.

This action arises from personal injuries allegedly sustained when members of the NYPD enforced a visitation order on behalf of the infant-plaintiff's father, Mr. Lopez, on March 14, 2013, at 1824 McGraw Avenue, Apt. 4b, Bronx, New York. The Police Officers allegedly seized the

infant-plaintiff from the home of her mother, at 10:00 pm on a school night. Approximately one (1) month after the incident in question, it is alleged that the infant-plaintiff was hospitalized due to auditory hallucinations and suicidal ideation regarding having to participate in supervised visitations with her father. Plaintiff alleges infliction of emotional distress, negligence, unreasonable seizure and violations of due process under 42 U.S.C. 1983.

Defendants application to dismiss plaintiff's Complaints against NYPD pursuant to CPLR §3211(a)(7-8) is heretofore granted without opposition. It should be noted that it appears that the NYPD is a not a proper party to suit in this case. *See* Ali v City of New York, 2011 N.Y. Misc. LEXIS 2167 (Sup. Ct. N.Y. Co. 2011); Jenkins v. City of New York, 478 F.3d 76, 93 (2d Cir. 2007).

Defendants' application to dismiss plaintiff's general negligence claim is heretofore granted. A party seeking summary judgment must demonstrate, *prima facie*, entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issue of fact. *See* Winegrad v. New York Univ. Med. Ctr., 64 N.Y. 2d 851 (1985). If the movement meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence demonstrating the existence of factual issues requiring a trial. *See* Zuckerman v. City of New York, 49 NY. 2d 557 (1980).

Moreover, pursuant to the General Municipal Law, a Notice of Claim must set forth, among other things, "the nature of the claim," and "the time when, the place where and the manner in which the claim arose." GML § 50-e(2). *See* Vargas v. City of NY, 105 A.D.3d 834 (2nd Dept. 2013). Here, plaintiff indicates in the Notice of Claim that defendant acted improperly and violated plaintiff's 4th, 5th, 14th Amendment rights, Due Process rights and caused intentional infliction of emotional distress. However, nowhere in the Notice of Claim is there any allegation relating to a cause of action for negligence. Moreover, the Notice of Claim is not specific enough to give the City notice to investigate the issues with respect to the negligence alleged. As such, this Court must dismiss their negligence claim for failure to comply with GML § 50-e.

Defendant has failed to make a *prima facie* showing for summary judgment as a matter of law on the issue of intentional inflection of emotional distress. Courts have held that the standard for determining whether a conduct rises to the level of intentional inflection of emotional distress is whether the conduct is "so outrageous in character, and so extreme in degree, as to go beyond all

possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community". Dillon, 261 A.D.2d at 41. Plaintiff's counsel contends that the City, through its agents, intentionally subjected plaintiffs to emotional distress. Defendant contends that plaintiff cannot maintain a claim against the City if their employees engaged in official conduct as a matter of public policy. Dillon v. City of N.Y., 261 A.D.2d 34, 41 (1st Dept. 1999).

It alleged that the infant-plaintiff's mother attempted to procure an Order of Protection against Mr. Lopez but failed to acquire one prior to the seizure. Thus, defendants' counsel argues that the police officer's conduct was not outrageous as they were enforcing an active Family Court Visitation Order. Plaintiff contends that the conduct was outrageous as the NYPD failed to review the database information readily available to them, which would have revealed Mr. Lopez's long history of domestic abuse against both the infant-plaintiff and her mother. Furthermore, plaintiff alleges that the Officers failed to follow the NYPD procedures for enforcing a Family Order by unreasonable seizure causing the inflection of emotional distress on plaintiff. There exists a material issue of fact on whether the Officers were acting within their official capacity or failed to follow NYPD protocol when enforcing the Order of Visitation. Moreover, defendants have failed to support their application with an affidavit of a party with knowledge and a significant amount of discovery remains outstanding. Therefore the granting of summary judgement at this stage would be improper. As such, defendants' application to dismiss plaintiff's claim for intentional infliction of emotional distress is heretofore denied with leave to renew.

Defendants' application for an Order, pursuant to CPLR §3103, for a protective order, modifying and/or limiting the directives contained in the November 12, 2015 Preliminary Conference Order, is heretofore denied. Many issues of material fact with respect to the plaintiff's claims turn on the NYPD policy, protocol and training and/or whether such policies and protocol and training was followed as it relates to the enforcement of a Family Court Visitation Order. Defendant contends that a directive to provide the NYPD training materials would be overly broad and is under public interest privilege. In Weingard v. City of N.Y., 9 Misc. 3d 891 (2003) the Court held that entitlement to a public interest privilege requires demonstration by the government of the specific public interest that would be jeopardized by an otherwise customary exchange of information. Here, defendants has failed to allege specific public interest that would be harmed by the disclosure. Moreover, defendants have failed to demonstrate undue prejudice, undue hardship

or how the interests of justice would best be served by modifying or limiting the directives contained in the November 12, 2015. Plaintiff has a basis for discovery of the training materials as they relate to their U.S.C. § 1983 claims of unreasonable seizure, violation of due process rights and intentional infliction of emotional distress. Thus, the motion for a protective order or to revise this Court's November 12, 2015 Prder is heretofore denied.

Accordingly, it is:

ORDERED that application by defendant for an Order, pursuant to CPLR §3211(a)(7-8), dismissing plaintiff's Complaint against NYPD, is heretofore granted. It is further

ORDERED that application by defendant for an Order, pursuant to pursuant, to CPLR §3212, dismissing plaintiff's general negligence claim, is heretofore granted. It is further

ORDERED that application by defendant for an Order, pursuant to pursuant to CPLR §3212 dismissing plaintiff's claim for Intentional Infliction of Emotional Distress, is heretofore denied with leave to renew. It is further

ORDERED that application by defendant for an Order, pursuant to CPLR §3103 a protective order, modifying and/or limiting the directives contained in the November 12, 2015 Preliminary Conference Order, is heretofore denied.

ORDERED that CITY shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry of this Order.

The forgoing constitutes the Decision and Order of the Court.

7/7/17

DATE

HON. WILMA GUZMAN, J.S.C